U.S. Department of Labor

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Issue Date: 12 December 2006

CASE NO.: 2006-LHC-34

OWCP NO.: 08-119856

IN THE MATTER OF

J.P.,
Claimant

v.

FRIEDE GOLDMAN OFFSHORE TEXAS, L.P.,
Employer

ZURIC AMERICAN INSURANCE CO.
Carrier

APPEARANCES:

JOHN D. MCELROY, ESQ.
On Behalf of the Claimant

SCOTT R. HYMEL, ESQ.
PATRICK E. O'KEEFE, ESQ.
On Behalf of the Employer/Carrier

BEFORE: JUDGE RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor workers' Compensation Act, 33 U.S.C. 901 et seq. (the Act), brought by J.P. (Claimant) against Friede Goldman Offshore Texas, L.P. (Employer) and Zurich American Insurance Company (Carrier). The formal hearing was conducted in Beaumont, Texas on May 27, 2006. Each party presented evidence, examined and cross examined the witnesses. The following exhibits were received into evidence: [1]

[1] [1] The following abbreviations will be used in citations to the record: JX – Joint Exhibit; CX – Claimant's Exhibit; EX –Employer's Exhibit; and TR – Transcript of the proceedings.
[1] JX-1.

(1) Joint Exhibit No. 1

(2) Claimant's Exhibits No. 1-10 [2]

(3) Employer's Exhibits No. 1-13

STIPULATIONS

The Court finds sufficient evidence to support the following stipulations:

1) Jurisdiction is not a contested issue. Claimant was working as a shipfitter working on a vessel at Employer's facility adjacent to navigable waters.
2) The date of Claimant's accident was March 21, 2001.
3) Claimant's accident was in the course and scope of employment.
4) An employer/employee relationship existed at the time of the accident.
5) Employer was advised of the injury on March 21, 2001.
6) Employer filed a Notice of Controversion on February 5, 2002/
7) Informal Conferences were held on February 27, 2004.

ISSUES

The unresolved issues in these proceedings are:

(1) Average weekly wage;
(2) Relatedness of low back condition to March 21, 2001 incident;
(3) Nature and extent of disability;
(4) Maximum medical improvement date;
(5) Entitlement to Section 7 medical benefits, including right to choose a physician;
(6) Interest;
(7) Attorney's fees and expenses;

SUMMARY OF THE EVIDENCE

Claimant is fifty years old, was born in Mexico and attended school six years there ad two years in the United States. He testified that he can speak and understand English but can read only "a little bit." (TR. 26).[3] Claimant moved to Port Arthur, Texas in 1975 and worked for several companies before commencing to work for Friede Goldman in 1993. He became a

[2] At the hearing, Employer was granted leave to file post-hearing Dr. Montet's deposition as Exhibit 14 which is hereby admitted. Claimant filed a letter report of Dr. Francis (July 14, 2006) as rebuttal evidence and requested its admission and also the deposition of Dr. Francis. Employer objected on the grounds that this report is not rebuttal. I agree with Employer. At the hearing Claimant was only granted the right to offer evidence in rebuttal to the deposition evidence of Claimant's treating physician, Dr. Montet. Dr. Francis had never examined Claimant prior to the hearing and rebuttal evidence should not entail the development of new evidence.

[3] An interpreter was present but by consent of all parties was only used for limited purposes.

shipfitter and did that work for about six years until the accident in 2001. As a shipfitter Claimant had to lift and carry his bucket of tools weighing about fifty pounds. Occasionally he had to lift items of one hundred pounds. He also was required to climb ladders, stairs, squat, and crawl. On March 3, 2001 Claimant fell, his right leg going into a hole, striking his right knee hitting the scaffold "and hit the floor you know with my hip . . ." (TR. 36). Claimant reported the accident to Mr. Henry, the head safety manager. He finished his shift. When his leg swelled up a couple of days later, the safety manager sent Claimant to see Dr. Montet. (TR. 38). Claimant testified that he did not read the Choice of Physician form (EX 10) and that he went to see him because the company always sends you to the company doctor. (TR. 40). He was released for light duty but Claimant contended the supervisors did not comply with the light duty restrictions. (TR. 43).

Dr. Montet did not help Claimant except to prescribe pain pills. Finally, he referred Claimant to Dr. King, a specialist who took x-rays and told Claimant "your knee's broke." (TR 44). He performed surgery the next day. Claimant testified that he started physical therapy Claimant continued to have pain and Dr. King referred him to another doctor, Dr. Jones, who told Claimant he probably needed another surgery. He recommended Claimant see another doctor, Dr. Jones, for tests. When Dr. King reviewed those results he told Claimant it was "too late for me to operate your leg . . ." (TR. 46). Claimant stated that he continued to have pain in his leg and it has gotten worse. Dr. King left the area and Claimant returned to Dr. Montet. Claimant testified that Dr. Montet told him he could not do anything more. (TR. 49). Claimant was also having back pain, "along the middle where my bone is . . ." (TR 49). He finally went to Gulf Coast Clinic in Port Arthur for treatment with Dr. Villegas. (TR. 50). He told Claimant he was developing rheumatoid arthritis and referred him for an MRI. (TR. 51).

Claimant also went to Mexico for treatment. He saw a Dr. Fernandez who said "I know you don't want to be operated, you know, operation on your back." (TR. 52). Claimant further testified about having to wear a knee brace since his knee may sometimes give out. He fell "one or two times already." (TR. 54).

Claimant stated his back pain is in the middle of his back and is "like your burning something with fire" (TR. 55). Excessive walking, sitting or standing causes the pain to worsen. He estimated that he can walk one block and then needs to sit down. He stated he can lift up to twenty pounds. He also has trouble bending and climbing. (TR. 56, 57). He testified that he cannot work around his house as he did before. (TR. 58).

In answering his attorney's questioning regarding looking for employment, Claimant stated:

> "Well, I went to look for work on, uh – when this lady she sued to come with a Lightfoot, the other lawyer, Lightfoot? She used to come and tell me need to find six jobs a week. I say, Six jobs a week? . . .
>
> I say, I can work nowheres. I would get applications and find out, you know, I missed, they not hiring anyway, you know?" (TR. 59)

Claimant also testified that he got two job applications. He remembers going into United Marine and applying. Also, he applied at the M&M Industrial, R&R marine, Horizon Offshore and Beacon was not hired. He testified he went to different places but could not remember the names. (TR. 63, 64).

On cross examination Claimant stated he went to the above enumerated jobs in September 2002 and had met with Gisclair Vocational Experts and they had advised Claimant to apply for these shipfitter jobs. He admitted that his back complaints did not prevent him from applying for these jobs. (TR. 72). Claimant also had previously gone to ABC Welding School and got a certificate to be a welder. He stated that his job as a shipfitter at Friede was light to medium work. Claimant also admitted that he never told the vocational rehabilitation experts that he had a back problem. Claimant explained "at that time my knee was hurting a lot. . ." (TR. 78). Claimant also admitted that during the period of March 2001, when the injury occurred and March 2003, when Dr Montet released him, he told no doctors that he had a back problem. (TR. 87).

Ms. Brown, a certified vocational counselor, testified that her vocational file showed that Claimant had undergone a CT of his lumbar spine which reflected an arthritic condition, osteoarthritis and that Dr. Montet has considered that MRI when he released Claimant with no restrictions. (TR. 130). As a result of this finding her company, Gisclair & Associates conducted a labor market survey. The labor market survey listed three jobs, Watercrafts Etc., Inc., Schwarzlosc Pools and Modern Manufacturing. (EX 3).

Ms. Brown testified that Claimant would have had transferable skills to work as a painter for Modern Manufacturing and that job was available even on the day that she testified. (TR. 137). She stated that Dr. Montet had signed off on that job as being suitable for Claimant. (TR. 137). The job position was industrial painter with duties listed as "using industrial sprayer to paint small, large and vertical objects, etc." This job paid $9.50 to $11.00 per hour. (EX 3).

MEDICAL EVIDENCE

Claimant's treating physician, Dr. Montet, diagnosed Claimant as having a left knee strain and contusion. He was treated conservatively including physical therapy, and after an MRI was performed which showed a torn medial meniscus of his knee, he was referred to Dr. King, an orthopedic surgeon.

On May 16, 2001, Dr. King performed arthroscopic surgery and removed the damaged fragment of the meniscus and performed a partial menisectomy. Claimant's convalescent period was marked by increased loss of control of his left foot and also muscle weakness in the upper left leg. Dr. King referred him to Dr. Jones for prescribed physical therapy. Dr. Jones, a physiatrist, noted that Claimant sustained a focal femoral nerve neuropathy secondary to traction or compression to the femoral nerve in the left thigh. An EMG was conducted by Dr. Siy on July 2, 2001, which revealed:

> "Denervation potentials were seen in the left thigh muscles innervated by the femoral nerve. There were both fibrillation potentials and positive sharp wave

potentials seen. Voluntary contraction motor unit potentials were seen, however, few in number. Other muscles tested in the left lower extremities including lumbar paraspinals and muscles proximal to the thigh as well as muscles distal to the thigh. Only the femoral nerve innervated muscles showed abnormalities. Nerve conduction studies reveal prolonged latencies in the left sural, left peroneal, and tibial. It is important to note that the sensory and motor evoked responses showed normal amplitude and duration." (CX 2, p. 1).

Dr. Jones, on July 5, 2001 concluded:

"Unfortunately at this time physical therapy will not prove helpful because the innervation to the quadriceps muscles is compromised. Once return of motor function occurs therapy will be necessary to restore his quadriceps strength and eliminate the patellar tendonitis." (CX 3, p. 2).

He recommended continued conservative treatment when he saw Claimant on October 15, 2001. Dr. Jones noted that manual muscle testing revealed improved strength. (CX 2, p. 3).

In a clinical note dated February 26, 2002, Dr. King indicated that the Claimant has maintained what muscles strength he has to try to rehabilitate his lower extremity and hopes that he can have some functional use of ambulating, flexion and extension of the left lower extremity. Dr. King further indicated that without having physical therapy modalities on a continual basis he will continue to have flaccid musculature as well as muscle spasms and atrophy of the lower extremity. (CX 4, p. 2).

On April 23, 2002, Dr. Agustin, a specialist in neurology, saw Claimant being referred by Dr. Montet. His impressions were: 1) Left leg weakness. Etiology is unclear. Lumbar radiculopathy needs to be excluded. 2) Mononeuropathy multiplex on the said leg needs to be excluded based on recent EMG. 3) Status post knee arthropathic surgery. (CX 3, p. 3).

Dr. Agustin recommended, "1) I recommend repeat EMG, nerve conduction study, of the left leg, and a lumbar CT. 2) Further treatment recommendations will be made depending on the test results." (CX 3, p. 3).

In a follow up report of October 1, 2002 Dr. Agustin noted a normal EMG nerve conduction study of the left leg and CT of the lumbar spine showing evidence of osteoarthritic changes, moderate degree on the left L5-S1 and a mild 3-mm posterior bulging of L4-5 disc which produces mild extrinsic pressure on the thecal sac.

His report concluded:

"IMPRESSION: 1) Mild disc bulging at L4-5 level on the left. 2) Osteoarthritic changes, moderate degree at Ls-S1 level. 3) Lumbar radiculopathy. 4) Status post-knee surgery.

RECOMMENDATIONS: I would recommend conservative treatment. He might benefit with a trial of nonsteroidal agents and physical therapy. I understand he completed his physical therapy already. I agree with referral to Dr Montet for impairment rating. Since he is still bothered by pain in the left knee, I would recommend an evaluation by an orthopedic surgery." (CX 3, p. 1).

On November 21, 2002, Dr. Montet concluded:

"It appears that he is impaired for the meniscectomy, partial and this equals two percent of the lower extremities or one percent whole person. The previous figure was secured from page 547, table 17-33 under the third column under meniscectomy, medial or lateral, partial.

J.P. still has some unexplained deficit in his left lower leg. He has had the opinion of four different specialists who agree that there was some neurological involvement that has appeared to resolve by documenting normal findings on EMG by Dr. Agustin. Dr. Agustin also suggested in his last consult that J.P. might well benefit at this point from physical therapy now that his neurological impairment has resolved. The physical therapy performed during the nerve damage period was more of a prophylaxis to prevent further muscle wasting and at this point physical therapy should be re-addressed to strengthen previous inactive muscle. With reference t his sensory deficit, he stated that he feels like he is walking on a sponge with his left foot. Discussing his daily activities, it does not appear that this deficit interferes with his activities of daily life, and for this reason I did not render an opinion or a rating on this sensory dysfunction.

Final Impairment: Two percent for the left knee
One percent for the whole person"

(EX 1, pg. 3)

On February 17, 2003, Claimant saw Dr. Montet (which turned out to be his final visit) and in Dr. Montet's March 3, 2003, report he stated:

"I informed him that the recent evaluation by neurology, EMG and physical therapy indicates that he has sufficiently recovered to return to work. He states that he still has pain. J.P. and I agreed that I would give him until the end of the week, 2/21/03, to discuss with his lawyer the issue of returning to work. The understanding was that J.P. would contact me with his decision by the end of the week. As of this dictation, 3/3/03, I have not had a return call or notification from J.P. concerning his intent to agree to return to work. It is my professional opinion, based on the documents and history of this case, that J.P. could safety return to work with no restrictions. I am establishing the return to work date as 03/03/03. I do not feel that I have any additional medical advice or opinions to offer this gentleman. I have informed him that he is entitled to other opinions and he is aware that he has the option of discussing this with his attorney." (EX 1, p. 1).

Claimant went to see Dr. Villegas at Gulf Coast Health Center because of his back pain. On September 16, 2003, Dr. Villegas noted that Claimant had chronic back pain and sent him to Galveston UTMB for further evaluation. (CX 6, p. 1). On November 5, 2004, Dr. Villegas noted "patient suffers from osteoporosis of lumbar sacral spine." (CX 6, p. 2)

Claimant went to Mexico and Dr. Fernandez, who in his October 27, 2003, report stated that Claimant had pain in the lumbar and dorsal column, which was of medium to severe intensity. Dr. Fernandez concluded that the muscular contraction is probably due to the limping while walking that is caused by the left knee. He ordered x-rays to rule out any other pathology. (CX 5, p.3). On July 28, 2004 Dr. Fernandez stated that x-rays demonstrated:

"1. Unstable lower lumbar column.
2. Spondilolisis of Spondilolistesis of L5-S1.
3. Probable posterior radicular compression and spinaltenosis."

He recommended specialized care in the field of orthopedics and trauma.

Dr. Montet, in his post-hearing deposition, stated that Claimant never made complaints of back pain to him until his February 21, 2003 office visit. (EX 14, p. 38). Dr. Montet said Claimant could return to work and indicated he had no further advice or opinion to offer Claimant. (EX 1, p. 1).

He further stated that had Claimant continued to complain of back problems he would have referred him to an orthopedist or neurosurgeon. (EX 14, pp. 14, 55, 56).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses, and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applies the principle, enunciated in Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates § 556(d) of the Administrative Procedure Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 281, 114 S.Ct. 2251, 2259, 129 L.Ed. 2d 221 (1994).

FACT OF INJURY AND CAUSATION

The claimant has the burden of establishing a *prima facie* case of compensability. He must demonstrate that he sustained a physical and/or mental harm and prove that working conditions existed, or an accident occurred, which could have caused the harm. Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336, 338 (1981); U.S.

Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318 (1982). Once the claimant establishes these two elements of his *prima facie* case, Section 20(a) of the Act provides him with a presumption that links the harm suffered with the claimant's employment. See Kelaita v. triple A Machine Shop, 13 BRBS 326 (1981); Hamptom v. Bethlehem Steel Corp., 24 BRBS 141, 143 (1990). When an employee sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside of work, the employer is liable for the entire disability and for medical expenses during both injuries if the subsequent injury is the natural and unavoidable result of the original work injury. See Atlantic Marine V. Bruce, 661 F.2d 898, 901, 14 BRBS 63, 65 (5th Cir. 1981); Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454, 456-57 (9th Cir. 1954); Mijangos v. Avondale Shipyards, 19 BRBS 15, 17 (1986). In addition, if a claimant's employment aggravates a non-work-related, underlying disease or condition so as to produce incapacitating symptoms, the resulting disability is compensable. See Gardner v. Bath Iron Works Corp., 11 BRBS 556 (1979), aff'd sub nom. Gardner v. Director, OWCP, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981).

After the Section 20(a) presumption has been established, the employer must introduce "substantial evidence" to rebut the presumption of compensability and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§ 902(2), 903. Only after the employer offers substantial evidence does the presumption disappear. Del Vicchio v. Bowers, 296 U.S. 280, 286, 56 S.Ct. 190, 193 (1935). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. Sprague v. Director, OWCP, 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the presumption disappears, and the issue of causation must be resolved based upon the evidence as a whole. Kier v. Bethlehem Steel Corp., 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15, 21 (1991).

In this case the Employer admits that Claimant injured his knee when he fell on March 21, 2001. The dispute involves the relationship of his back condition to the accident of March 21, 2001.

Dr. Montet, in 2002, being aware of possible back injury referred Claimant to Dr. Agustin, a neurologist, who ordered a lumbar CT which disclosed osteoarthritic changes in the lumbar spine, mild disc bulging at L4-5 and lumbar radiculopathy. Moreover, Dr. Hernandez stated that the muscular contraction was probably due to the Claimant's limping, which was caused by the knee injury. As such, I find there is sufficient evidence to invoke the Section 20(a) presumption since Claimant has proven he sustained a physical harm and that the accident could have caused or aggravated the harm.

The absence of medical evidence stating that Claimant's arthritic condition was not aggravated by his work injury is significant. Once the presumption is invoked, it is Employer's burden to produce evidence that Claimant's continued work did not aggravate his prior condition. *See Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981) *cert denied*, 456 U.S. 904 (1982). Otherwise, Employer is liable for Claimant's entire disability if Claimant's work aggravated a prior condition. *See generally Strachan Shipping v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1985) (*en banc*). The Board dealt with this same issue in *Bolden v. Ingalls Shipbuilding, Inc.*, BRB No. 01-0693 (May

16, 2002)(unpublished), and even with rebuttal evidence found that the claimant had invoked the presumption and that it had not been rebutted by substantial evidence.

Claimant suffers from lumbar spine osteoarthritis, and none of the medical health professionals were able to deny that Claimant's condition may have been aggravated by Claimant's work injury. To the contrary, Dr. Hernandez opined that it probably is due to his limping from his knee injury. Claimant has documented injuries; the diagnostic tests indicate a disc bulge as well as osteoarthritis, which may have been aggravated by his knee injury. Consequently, I find that during the course and scope of Claimant's employment a harm and the existence of work injury existed which caused Claimant's leg and back conditions and required him to discontinue his work with Employer. Employer's evidence is insufficient to rebut the presumption.

The U.S. Fifth Circuit in *Conoco Inc. v. Director,* 194 F.3d 684 (5th Cir. 1999) explicitly stated that although the Employer's burden is less than a preponderance of the evidence, it is still substantial evidence that the injury as not work-related.[4]

NATURE AND EXTENT OF DISABILITY

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage-earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. SGS Control Servs. v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984); SGS Control Servs., 86 F.3d at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5 (1985); Trask, 17 BRBS at 60; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum medical benefit of medical treatment such that his

[4] Recently the Fifth Circuit reiterated the importance of using the correct burden of proof in assessing Longshore claims, naming the *Conoco* decision as the correct case to follow. *See Ortco Contractors, Inc. v. Charpentier*, 322 F.3d 283 (5th Cir. 2003).

condition will not improve. This date is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. Louisiana Ins. Guar. Ass'n v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

In this case the parties have stipulated that Claimant was paid temporary total disability from May 9, 2001 to April 18, 2003 (100 weeks/3 days) at $233.46 per week, a total of $23,679.50. In addition, Employer paid Claimant for a permanent partial disability of 2 percent of the left lower extremity in the amount of $1,344.72.

Dr. King had found Claimant to have reached maximum medical improvement in February 2002 and referred Claimant back to Dr Montet for a permanent impairment rating on his left leg. In addition, Dr. Montet stated in his November 21, 2002 report that the opinions of four different specialists agree that there was some neurological involvement that has been resolved by documented normal findings on EMG by Dr. Agustin. (EX 1, p. 3). On December 3, 2002, Dr. Montet was of the opinion that Claimant had reached maximum medical improvement. (EX 3, p. 4).

I therefore find Claimant reached maximum medical improvement on November 21, 2002.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin,* 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan,* 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment establishes a prima facie case of total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P&M Crane v. Hayes,* 930 F.2d 424, 430 (5th Cir. 1991); *N.O. (Gulfwide) Stevedores v. Turner, 661* F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date which the employer demonstrates 'the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp.,* 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.,* 17 BRBS 64 (1985). Issues relating to nature and extent do not benefit from the Section 20 (a) presumption. The burden is upon Claimant to demonstrate continuing disability (whether temporary or permanent) as a result of his accident.

In order to establish suitable alternative employment, an employer must show Claimant is capable of working, even if it's within certain medical restrictions, and there is work within those restrictions available to him. *New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 1042-1043, 14 BRBS 156, 164-165 (5th Cir. 1981), *rev'g 5* BRBS 418 (1977). Where the employer withdraws its light duty job, as Employer here did on December 2, 1999, when Claimant was laid off, the burden of establishing subsequent, suitable alternative employment remains with the employer. *Mendez, supra.*

Claimant is obligated to take employment within his physical restriction and Employer is responsible for the difference between Claimant's new weekly wage and his former weekly wage. When suitable alternative employment is shown, the wages which the new positions would have paid at the time of Claimant's injury are compared to Claimant's pre-injury wage to determine if he has sustained a loss of wage earning capacity. *Richardson v. General Dynamics Corp.,* 23 BRBS 327. 330 (1990). Total disability becomes partial disability on the earliest date that the employer establishes suitable alternative employment. *Palombo v. Director, OWCP,* 937 F.2d 70, 25 BRBS l(CRT) (2nd Cir 1991). The ultimate objective in determining wage earning capacity is to determine the wage that would have been paid in the open market under normal employment conditions to the claimant as injured. *Devillier v. National Steel and Shipbuilding,* 10 BRBS 649, 660 (1979).

In this case, the Employer paid the Claimant his permanent partial disability according to the statute for his knee. Claimant was released without restrictions and Employer attempted to satisfy the statutory duty to find Claimant suitable alternative employment.[5]

Mr. Brown, Employer's certified vocational rehabilitation counselor with Gisclair and Associates, identified three specific jobs suitable for Claimant and approved by his treating physician, Dr. Montet, on April 3, 2003. All of the jobs were in the Beaumont, Teas area and in close proximity to where Claimant resided. (TR. 134). In particular, Modern manufacturing had a job as an industrial painter available at $9.50 to $11.00 per hour, Watercrafts Etc., Inc. had a painter job at $6.50 to $9.50 an hour and, Schwarzlosc Pools, a service technician (wage information unavailable). Dr. Montet approved each of these jobs noting that the job descriptions fell within the physical capabilities of Claimant. (One duty being frequent lifting of 21-50 pounds.) Claimant contended that Claimant's poor skills in reading and writing English prevented most jobs as being suitable. I find that Claimant's ability to work in an English speaking environment for over thirty years, speaks volumes for his flexibility and skills. I note that his ability to understand and speak English at the hearing also shows his capabilities to work at these jobs identified by Employer. Also, as Employer noted, Claimant's taking the class and receiving a welder's certification is added proof of Claimant's abilities. Therefore, I find the three jobs appropriate based on my observation of Claimant at the formal hearing as well as reviewing the totality of his testimony and the record as a whole, I find that an average of the two salaries is $9.13 per hour and based on a forty hour week, I find that Claimant's residual earning capacity to be $365.00 per week..

The Court finds that Claimant did not meet his burden of proving a diligent search and willingness to work. Claimant admitted that he never went to these jobs I have found to be suitable (TR. 100, 111-113). I thus find Claimant not diligent.

Average Weekly Wage

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910(d)(1). The computation methods are directed towards

[5] Friede Goldman, on May 8, 2002, had a reduction in force and terminated Claimant. (EX 11, p. 1)

establishing a claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co., 25* BRBS 340 (1992); *Lobus v. I.TO. Corp.,* 24 BRBS 137 (1990).

Sections 10(a) and 10(b) apply to an employee working full-time in the employment in which he was injured. *Roundtree v. Newpark Shipbuilding & Repair, Inc.,* 13 BRBS 862 (1981), *rev'd* 698 F.2d 743, 15 BRBS 94 (CRT)(5th Cir. 1983*), panel decision rev'd en banc,* 723 F.2d 399, 16 BRBS 34 (CRT)(5th Cir.) *cert. denied,* 469 U.S. 818 (1984). Section 10(a) applies if the employee worked "substantially the whole of the year" preceding the injury, which refers to the nature of the employment not necessarily the duration. The inquiry should focus, on whether the employment was intermittent or permanent. *Gilliam v. Addison Crane Co.,* 21 BRBS 91(1987); *Eleazer v. Genera/ Dynamics Corp.,* 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady then Section 10 (a) should apply. *Duncan v. Washington Metropolitan Area Transit,* 24 BRBS 133 (1990) (holding that 34.5 week of work was "substantially the whole year", where the work was characterized as "full time", "steady" and "regular"). The number of weeks worked should be considered in tandem with the nature of the work when deciding whether the Claimant worked substantially the whole year. *Lozupone v. Lozupone & Sons,* 12 BRBS 148, 153-156 (1979).

Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for substantially the whole year. 33 U.S.C. § 910(b); *Empire United Stevedores v. Gatlin,* 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991). This would be the case where the Claimant had recently been hired after having been unemployed. Section 10(b) looks to the wages of other workers and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole of the year preceding the injury, in the same or similar employment, in the same or neighboring place. Accordingly, the record must contain evidence of the substitute employee's wages. *See Sproull v. Stevedoring Servs. of America, 25* BRBS 100, 104 (1991).

Section (c) is a catch-all to be used in instances when neither (a) nor (b) are reasonably and fairly applicable. If employee's work is inherently discontinuous or intermittent, his average weekly wage for purposes of compensation award under Longshore and Harbor Workers' Compensation Act (LHWCA) is determined by considering his previous earnings in employment in which he was working at time of injury, reasonable value of services of other employees in same or most similar employment, or other employment of employee, including reasonable value of services of employee if engaged in self-employment. Longshore and Harbor Workers' Compensation Act, §§10(c), 33 U.S.C.A. §§910(c). *New Thoughts Finishing Co. v. Chilton,* 118 F.3d 1028 (5th Cir. 1997)

Since Claimant had not been employed with Employer for substantially the whole year. 10(a) is an inappropriate method of calculating the average weekly wage Similarly, there is insufficient evidence to invoke the method designated under 10(b). Therefore, I will use 10(c) to most fairly and reasonably determine Claimant's average weekly wage at the time of his accident.

Claimant states that the wage printout showing his wage earned from August 2000 through the date of injury in March 2001 shows a 33 week period with earnings totaling $18,381.75. (CX 4). This would produce an average weekly wage of $557.02. Alternatively, Claimant suggests using the W-2 reports ; 1998 wage of $35,310.22; 1999 wages of $32,794.11 and the annual earnings report of Friede for 2000 showing wages of $9,003.25 plus the 11 weeks earnings in 2001 prior to the March 21, 2001 injury totaling $9,378.50. The 3 year plus 11 weeks of earnings total $86,486.08 divided by 167 weeks, Claimant's average weekly wage would be $517.88.

Employer urges use of the claims examiner's calculation which was using the 1998, 1999 and 2000 earnings of $8,629.19 and dividing by 156 weeks equals $491.88 as an average weekly wage.

I agree with using the method Claimant used in his alternative position, namely adding in the 11 weeks earning in 2001 and using the Claimant's actual earnings in 2000 ($9003.25 vs. $8,629.19). I find the method is a more reasonable way to find what would e a fair and reasonable approximation of the Claimant's annual wage earning capacity at the time of his injury. This calculation takes into account not only Claimant's higher earnings in 2001, but also is very low earnings in 2000. I thus find Claimant's average weekly wage to be $517.88.

Since the Employer did not prove suitable alternative employment until after Claimant reached maximum medical improvement (on November 21, 2002). Claimant is entitled to temporary total benefits from March 21, 2001 until November 21, 2002. Then on November 21, 2002 Claimant is entitled to permanent total disability until suitable alternative employment was established by Employer namely April 4, 2003.

Since Claimant was found not diligent, I have determined that he is entitled to the difference between his average weekly wage of $517.88 and his residual earning capacity of $365.02 per week or $152.88 which would commence on April 4, 2003 and continue.

CHOICE OF PHYSICIAN

Section 7(b) of the Act provides: "The employee shall have the right to choose an attending physician authorized by the Secretary t provide medical care under this Act as hereinafter provided." 33 U.S.C. § 907(b). Once the employee has made his initial free choice of physician, he may change physicians only upon obtaining prior written consent of the employer, the carrier, or the Deputy Commissioner. 33 U.S.C. § 907(c)(2). The Act also provides that "such consent *shall* be given in cases where an employee's initial choice was not of a specialist whose services are necessary for, and appropriate to, the proper care and treatment of the compensable injury or disease. In all other cases, consent *may* be given upon a showing of good cause for change." 33 U.S.C. § 907(c)(2) (emphasis added).

In this case, the record contains a choice of physician form indicating that Claimant chose Dr. Montet as his choice of physician. (EX 10). Claimant contends that Dr. Montet was not his choice of physician because, despite his signature, he was not aware that he was selecting his one and only choice of physician. Claimant asserts that he signed the form because he thought the

form was a necessary prerequisite to receiving treatment from Dr. Montet. (TR. 40). Claimant further testified that the Employer always say "Go to the doctor," the company doctor is what they tell, you know?" (TR 40). After initial treatment, Dr Montet referred Claimant to an orthopedist, Dr. King. After Dr. King left the area, Claimant was not referred to any other orthopedist. He saw Dr. Montet for over two years. (TR 81).

Claimant contends Dr. Montet was not Claimant's choice of physicians. Since there is no evidence that Claimant was informed of his right to choose his initial physician, I agree with Claimant's position. However, by continuing to see Dr. Montet as well as his referrals to physicians, Drs. King, Jones and Agustin, I find that Claimant has accepted Dr. Montet to be his choice of physicians. There is no evidence that Claimant or his earlier attorneys had requested a change of physicians from Dr. Montet.

REASONABLE AND NECESSARY MEDICAL EXPENSES

Section 7(a) of the Act provides that:

> (a) the employer shall furnish such medical, surgical, and other attendance or treatment, nurse or hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-58 (1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); see also Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), aff'g 12 BRBS 65 (1980). An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. §702.421; *See also* Shahady v Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982) (per curiam), *rev'g* 13 BRBS 1007 (1981), *cert denied*, 459 U.S. 1146 (1983); *See* McQuillen v. Horne Brothers, Inc., 16 BRBS 10 (1983); *See* Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983).

In this case I have found the Claimant's injury including his back were related to his employment and I therefore find that Employer is responsible for all reasonable medical expense necessary to care for Claimant's injuries. In particular, I find Claimant is entitled to an evaluation by a board certified orthopedist regarding his lumbar spine.

ORDER

1) Employer shall pay to Claimant temporary total disability benefits from March 21, 2001 until November 21, 2002, based on an average weekly wage of $517.88.

2) Employer shall pay to Claimant permanent total disability benefits from November 22, 2002 until April 4, 2003.

3) Employer shall pay to Claimant permanent partial disability benefits from April 5, 2003, and continuing, based on his average weekly wage of $517.88 and his residual earning capacity of $365.00 per week. Such compensation for permanent total and permanent partial disability shall be adjusted annually for cost of living increases pursuant to Section 10(f) of the Act.

4) Employer shall be entitled to a credit for all payments of compensation previously made to Claimant.

5) Employer shall pay to Claimant interest on any unpaid compensation benefits. The rate shall be calculated as of the date of this Order at the rate provided by 28 U.S.C. Section 1961.

6) Employer shall pay Claimant for all reasonable and necessary future medical expenses that are the result of Claimant's employment-related injuries.

7) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten days from receipt of the fee petition in which to file a response.

8) All calculations necessary for the payment of this award are subject to verification and adjustment by the OWCP District Director.

A

RICHARD D. MILLS
Administrative Law Judge